

HANSON BRIDGETT LLP  
KURT A. FRANKLIN, SBN 172715  
kfranklin@hansonbridgett.com  
LISA M. POOLEY, SBN 168737  
lpooley@hansonbridgett.com  
SAMANTHA WOLFF, SBN 240280  
swolff@hansonbridgett.com  
425 Market Street, 26th Floor  
San Francisco, California 94105  
Telephone: (415) 777-3200  
Facsimile: (415) 541-9366

HANSON BRIDGETT LLP  
TYSON M. SHOWER, SBN 190375  
tshower@hansonbridgett.com  
LANDON D. BAILEY, SBN 240236  
lbailey@hansonbridgett.com  
500 Capitol Mall, Suite 1500  
Sacramento, California 95814  
Telephone: (916) 442-3333  
Facsimile: (916) 442-2348

OTTEN LAW, PC  
VICTOR OTTEN, SBN 165800  
vic@ottenlawpc.com  
KAVITA TEKCHANDANI, SBN 234873  
kavita@ottenlawpc.com  
3620 Pacific Coast Highway, #100  
Torrance, California 90505  
Telephone: (310) 378-8533  
Facsimile: (310) 347-4225

Attorneys for Plaintiffs  
CORY SPENCER, DIANA MILENA  
REED, and COASTAL PROTECTION  
RANGERS, INC.

**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

CORY SPENCER, an individual;  
DIANA MILENA REED, an  
individual; and COASTAL  
PROTECTION RANGERS, INC., a  
California non-profit public benefit  
corporation,

Plaintiffs,

CASE NO. 2:16-cv-02129-SJO (RAOx)

**PLAINTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR  
ADMINISTRATIVE RELIEF  
PURSUANT TO FRCP 56(d)**

1  
2 v.

Judge: Hon. S. James Otero  
Date: September 5, 2017  
Time: 10:00 a.m.  
Crtrm.: 10C

3 LUNADA BAY BOYS; THE  
4 INDIVIDUAL MEMBERS OF THE  
5 LUNADA BAY BOYS, including but  
6 not limited to SANG LEE, BRANT  
7 BLAKEMAN, ALAN JOHNSTON  
8 AKA JALIAN JOHNSTON,  
9 MICHAEL RAE PAPAYANS,  
10 ANGELO FERRARA, FRANK  
11 FERRARA, CHARLIE FERRARA,  
and N. F.; CITY OF PALOS VERDES  
ESTATES; CHIEF OF POLICE JEFF  
KEPLEY, in his representative  
capacity; and DOES 1-10,

Complaint Filed: March 29, 2016  
Trial Date: November 7, 2017

12 Defendants.  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

# **TABLE OF CONTENTS**

	<b><u>Page</u></b>
I. INTRODUCTION.....	1
II. FACTUAL BACKGROUND .....	3
A. Plaintiffs’ have brought claims against both the Bay Boys and the government officials that either actively or tacitly support their illegal activities.....	3
B. Plaintiffs’ discovery requests seek cell phone text messages between and among the police department and the Bay Boys. ....	5
C. Plaintiffs have been diligently attempting to acquire the necessary discovery.....	5
1. Plaintiffs have diligently sought the cell phone records of the PVE police, but were required to oppose PVE’s motion for summary judgment without this information. ....	5
2. Plaintiffs have diligently sought Defendant Papayans’ cell phone records but were required to oppose Papayans’ summary-judgment motion without ever receiving this information.....	7
3. Charlie and Frank Ferrara obstructed the discovery of their cell phone records and only completed production pursuant to a court order on July 26, which was well after the Court-mandated date and after they both filed motions for summary judgment.....	8
D. Defendants’ Motions for Summary Judgment are predicated in large part on a purported lack of evidence.....	12
III. ARGUMENT .....	13
A. Ninth Circuit precedent requires the grant of motions under Rule 56(d) where discovery is yet to be produced. ....	13
B. Rule 56(d) relief is necessary because the City has failed to produce cell phone records and text messages of its city officials and police officers.....	15
C. Rule 56(d) relief is necessary because, despite diligent efforts, Michael Papayans’ cell phone data has yet to be produced.....	16
D. Rule 56(d) relief is necessary because Defendants wrongfully withheld documents until after filing for summary judgment.....	16
IV. CONCLUSION .....	17

## TABLE OF AUTHORITIES

**Page(s)**

### **Cases**

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) .....	14
<i>Brocade Communications Systems, Inc. v. A10 Networks, Inc.</i> , 2012 U.S. Dist. LEXIS 2022, Case No. 10-CV-03428-LHK (N.D. Cal. Jan. 6, 2012) .....	13
<i>Burlington Northern Santa Fe R. Co. v. Assiniboine and Sioux Tribes of Fort Peck Reservation</i> , 323 F.3d 767 (9th Cir. 2003) .....	13, 14
<i>City of San Jose v. Ted Smith</i> , 2 Cal. 5th 608 (2017) .....	7, 15
<i>Garret v. City &amp; Cnty. of San Francisco</i> , 818 F.2d 1515 (9th Cir. 1987) .....	14, 15
<i>Hart v. Gaione</i> , 2005 WL 419696 (C.D. Cal. 2005) .....	14
<i>Lathrop v. Uber Technologies, Inc.</i> , 2016 WL 3648596 (N.D.Cal., 2016) .....	15
<i>Metabolife Intern., Inc. v. Wornick</i> , 264 F.3d 832 (9th Cir.2001) .....	14
<i>Roberts v. McAfee, Inc.</i> , 660 F.3d 1156 (9th Cir. 2011) .....	13
<i>United States v. Real Property and Improvements Located at 2366 San Pablo Avenue, Berkeley, California</i> , 2014 WL 3704041 (N.D. Cal. 2014) .....	14

### **Other Authorities**

Fed. R. Civ. P. 56 .....	<i>passim</i>
--------------------------	---------------

**I. INTRODUCTION**

Defendants ask the Court to enter summary judgment in their favor while improperly evading Plaintiffs' discovery requests. The Defendants have acted in concert to preclude Plaintiffs from gathering the very discovery needed for Plaintiffs to fully oppose the pending motions. Because of this, Plaintiffs are entitled to relief under Federal Rule of Civil Procedure 56(d): Plaintiffs have repeatedly and diligently attempted to obtain the discovery necessary to address issues raised in Defendants' motion, only to have Defendants "delete," mishandle, or otherwise withhold this information from Plaintiffs. This material is the subject of outstanding discovery requests and motions to compel. Plaintiffs request that all of Defendants' motions be denied, or, in the alternative, that Plaintiffs be allowed to resolve their discovery disputes, gather the discovery they seek, and file supplemental oppositions to the motions.

Plaintiffs' claims center on the Lunada Bay Boys gang members conspiring to prevent outsiders from accessing and enjoying Lunada Bay through threats, intimidation, and violence. Plaintiffs further claim that the City of Palos Verdes Estates has a practice of actively or tacitly supporting this behavior. Plaintiffs have demanded specific discovery that will show direct evidence of both actual violence and the conspiracy in support. While partial evidence has been provided by a few of the Defendants, Defendants have evaded discovery demands and refused to produce documents. The discovery demands include the following:

- Defendant City of Palos Verdes Estates cellular telephone data from its police officers and city officials used in their duties; and
- Defendant Michael Papayans' cellular telephone data.

1 The sought-after discovery goes to the heart of Plaintiffs' claims  
2 and will show the communications between and among the Bay Boys and  
3 the City coordinating violence to and intimidation of outsiders.  
4 Defendants' arguments on summary judgment center on allegations that  
5 Plaintiffs lack sufficient evidence. At the same time, Plaintiffs have been  
6 forced to file a motion to compel the City's cell phone records, following  
7 extensive meet and confer efforts. Moreover, Defendant Michael  
8 Papayans' cell phone was impounded as evidence by the Los Angeles  
9 Police Department (LAPD) after he was involved in a criminal incident  
10 at Dodger Stadium. The parties have been diligently working for the  
11 release of Defendant Papayans' cell phone from the LAPD's custody to a  
12 digital forensics firm in order to copy and review his cell phone data.

13 Furthermore, Plaintiffs only received the cellular telephone data  
14 from Defendant Charlie Ferrara less than two weeks ago (notably, after  
15 his summary-judgment motion was filed), and from Defendant Frank  
16 Ferrara the week before that, despite having propounded the relevant  
17 discovery requests in November 2016 and after meeting and conferring  
18 with their counsel since January. These documents were only finally  
19 produced following Court order (and was produced late in violation of the  
20 Court order), and they are heavily redacted. At a time when Plaintiffs  
21 are responding to eight motions for summary judgment, it is impossible  
22 to analyze and synthesize the new document productions (which total  
23 over 4,100 pages), and meet and confer over the improper redactions,  
24 that clearly should have been produced earlier. This is in addition to the  
25 numerous documents that have been lost due to Defendants' spoliation of  
26 evidence. *See* Plaintiffs' Opposition to Individual Defendants' Motions  
27 for Summary Judgment, at p. 19 [ECF No. 328]; *see also* Plaintiffs'  
28 Statement of Additional Material Facts, at p. 132-133.

1 The Court should not tolerate this gamesmanship, and should deny  
2 Defendants' motions for summary judgment in their entirety. The  
3 discovery that has been withheld and/or belatedly produced is relevant to  
4 each Defendants' summary-judgment motion in that Plaintiffs have  
5 alleged a conspiracy exists between and among the Defendants, along  
6 with support from the City. Numerous texts and emails have already  
7 proven this relationship, however, Defendants are entitled to *all* relevant  
8 information that may exist in this regard from *each Defendant*.<sup>1</sup> Each  
9 and every cell phone text is likely to implicate one or more Defendants  
10 in the conspiracy. Thus, the data currently sought by Plaintiffs is critical  
11 to opposing each Defendants' motion. In the alternative, this Court  
12 should allow time for Plaintiffs to acquire and review the documents they  
13 seek, and have the opportunity to file supplemental oppositions to all  
14 motions for summary judgment.

## 15 II. FACTUAL BACKGROUND

### 16 A. Plaintiffs' have brought claims against both the Bay Boys and the 17 government officials that either actively or tacitly support their illegal activities.

18 Plaintiffs filed their Complaint on March 29, 2016, bringing claims  
19 against individual members of the Lunada Bay Boys gang, the city of  
20 Palos Verdes Estates ("PVE" or "the City"), and PVE's Chief of Police Jeff  
21 Kepley in his representative capacity. *See* Complaint, ECF No. 1. PVE  
22 is a city of approximately 13,500 residents, having a median household  
23 income of more than \$170,000. *Id.*, at ¶ 5. Its "natural beauty is a  
24 \_\_\_\_\_

25 <sup>1</sup> For instance, while Defendants Charlie and Frank Ferrara claimed that no  
26 correspondence existed between them and any co-Defendant, Defendant Sang Lee  
27 produced a privilege log documenting numerous communications between  
28 Defendants Lee, Charlie Ferrara, and Frank Ferrara.



1 unique respite” from neighboring Long Beach, Los Angeles, and the other  
2 nearby industrialized and flatland communities. *Id.*

3 Plaintiffs contend the Bay Boys of PVE engage in numerous illegal  
4 activities in an effort to “protect” these lands from “undesirable”  
5 outsiders. The Bay Boys “confront, threaten, intimidate, and harass non-  
6 local beachgoers.” *Id.* “[T]heir assaults... thefts... vandalism to vehicles  
7 and personal property, and threats are for the purpose of establishing a  
8 curtain of intimation to drive out-of-area beachgoers, which they label  
9 riffraff, away from the coastal area of Lunada bay.” *Id.* These actions  
10 constitute the Bay Boys’ violation of the Bane Act, California Coastal  
11 Act, public nuisance, assault, and battery. *See id*, at p. 23, 27, 31, 38,  
12 and 39.

13 Plaintiffs further contend that PVE, its city officials, and its police  
14 force either discriminate directly, are indifferent, or otherwise actively  
15 support the Bay Boys gang via the friendship and otherwise close  
16 relationship between PVE officers, city officials and Bay Boys. “With  
17 more than 40 police personnel and its own jail, PALOS VERDES  
18 ESTATES is aware of the LUNADA BAY BOYS’ criminal activity  
19 against visiting beachgoers, but has a policy, customer, and practice of  
20 taking no action [and directly discriminating against, as uncovered in  
21 discovery] when it involves the LUNADA BAY BOYS and the individual  
22 Defendants.” *Id.*, at ¶ 28. For purposes of what is still before this Court,  
23 against PVE, Plaintiffs contend violations of Section 1983 under the  
24 Equal Protection Clause due to PVE’s custom and practice of exclusion,  
25 thus necessitating three levels of Section 1983 Equal Protection analysis:  
26 (1) strict scrutiny; (2) intermediate scrutiny; and (3) rational basis  
27 review. *See id*, at p. 29, 30, and 31.

28



**B. Plaintiffs' discovery requests seek cell phone text messages between and among the police department and the Bay Boys.**

Plaintiffs contend that the conspiracy between and among the Bay Boys, the PVE city officials, and police department was conducted mainly via electronic communications such as email and text messages.

Accordingly, Plaintiff Spencer served comprehensive document requests on all Defendants encompassing text messages sent on cellular telephones. For example, Plaintiff served a First Set of Requests for Production on PVE requesting, "All DOCUMENTS REFERRING or RELATED TO any DEFENDANT," and "Any DOCUMENTS REFERRING or RELATED TO The Lunada Bay Boys or the Bay Boys." See Declaration of Samantha Wolff, Exh. 1, at 9, 12. The definition of "Documents" explicitly includes text messages. See *id.*, Exh. 1, at 3.

Plaintiff also served comprehensive documents requests on Michael Papayans, Charlie Ferrara, and Frank Ferrara. Each set of requests for production included, for example, an RFP No. 7 requesting, "Any text messages or records of phone calls with a co-defendant in this matter." See Wolff Decl., Exhs. 2, 3, and 4. The Requests to Charlie and Frank Ferrara were both served on November 16, 2016; the Requests to Michael Papayans was served on February 1, 2017. See *id.*

**C. Plaintiffs have been diligently attempting to acquire the necessary discovery.**

**1. Plaintiffs have diligently sought the cell phone records of the PVE police, but were required to oppose PVE's motion for summary judgment without this information.**

Plaintiffs and the City have been in a dispute over the scope of the documents that the City must preserve, collect, and produce. Plaintiffs contend that the City must produce responsive material from the police officers' personal cellular telephones to the extent that the police offers

1 were using such telephones for official city business. As early as  
2 November 22, 2016, counsel for plaintiffs indicated that:

3 We also discussed the use of personal mobile devices by city  
4 employees while acting in the course and scope of their employment.  
5 You indicated you were making efforts to address voluntary  
6 preservation of those devices. However, we certainly did not agree that  
7 the City was not in possession, custody or control of those devices. To  
8 the extent the City allows such use to occur by policy (or lack thereof),  
allows users to connect those devices to city systems or systems under  
the city's control (such as email, Nextdoor or Nixle, among others) and  
those devices hold relevant information, the City has sufficient control  
over those devices such that the relevant information they hold should  
be preserved and produced in discovery.

9 *See Wolff Decl., Exh. 5*, at p. 3. Counsel for the City responded on  
10 December 29, 2016, arguing that, “We informed you that the City could  
11 not compel the officers to do so, because those personal devices are not  
12 within the City’s control, possession, or custody.” *See Wolff Decl., Exh. 6*.

13 To bring the issue to a head, counsel engaged in telephonic meet  
14 and confers on June 13, 2017 and June 23, 2017. *See Wolff Decl., ¶ 13*.  
15 During both of those discussions, the City agreed to initiate an inquiry  
16 into whether City employees have used personal devices for City  
17 business. *Id.* It was clear from these conversations that the City had not  
18 previously asked City officials whether they possessed relevant  
19 information, despite discovery requests seeking this information which  
20 had been propounded (and responded to) months prior. *Id.* Despite the  
21 City’s promise to provide this information in short order, Plaintiffs never  
22 received anything further. *Id.* Instead, the City filed its motion for  
23 summary judgment, which Plaintiffs opposed on July 31, 2017.

24 After being unable to resolve the issue informally, Plaintiffs filed a  
25 motion to compel production on August 7, 2017. *See ECF No. 393*. In  
26 the motion, the Plaintiffs seek the City’s production of documents that  
27 refer or relate to individually-named Defendants. This includes the cell  
28 phone data (text messages, voicemails, and emails) of City employees

1 and police officers, even if it is stored on a personal device. *City of San*  
2 *Jose v. Ted Smith*, 2 Cal. 5th 608 (2017). Accordingly, Plaintiffs expect  
3 that the grant of their motion to compel will result in a rich source of  
4 documents tending to prove that the police force supports and  
5 coordinates with the Bay Boys to ensure the exclusion of outsiders.

6 **2. Plaintiffs have diligently sought Defendant Papayans' cell**  
7 **phone records but were required to oppose Papayans'**  
8 **summary-judgment motion without ever receiving this**  
9 **information.**

10 Plaintiffs have also been diligently seeking the cellular telephone  
11 records of Defendant Michael Papayans. Papayans served his responses  
12 to Plaintiffs' documents requests on March 20, 2017, but he did not  
13 indicate that his cell phone had been seized as a part of a criminal  
14 investigation. *See Wolff Decl., Exh. 7.* To the contrary, Papayans'  
15 response to RFP No. 7 was merely that "Responding Party will comply to  
16 the extent Responding Party has responsive documents. Discovery and  
17 investigation are continuing." *Id.*, at p. 3.

18 It was only during a meet and confer on April 17, 2017, when  
19 Plaintiffs first learned that Defendant Papayans' cell phone was in the  
20 LAPD's custody due to an ongoing criminal investigation. *See Wolff*  
21 *Decl., Exh. 8 at 4-5.* Counsel for Plaintiffs then met with the District  
22 Attorney who prosecuted Defendant Papayans' criminal case, who  
23 informed Plaintiffs' counsel that he needed a court order to turn over the  
24 telephone. *See Wolff Decl., ¶ 16.* In an email dated May 4, 2017,  
25 counsel for Plaintiffs requested that Defendant Papayans enter into a  
26 stipulation releasing the phone to an eDiscovery vendor. *See id.*, Exh. 8,  
27 at 4-5. Defendant Papayan's counsel responded on May 15, agreeing to  
28 enter into such a stipulation. *See id.*, at 3.

After negotiation, the parties agreed to the stipulation and filed it

1 on July 7, 2017. *See* ECF No. 263. The Court issued the Order on July  
2 12, 2017. *See* ECF No. 265. The eDiscovery vendor received the phone  
3 on August 1, 2017, but counsel for Papayans did not inform Plaintiffs  
4 until August 3. *See* Wolff Decl., Exh. 8, at p. 1-2. Since that time, the  
5 eDiscovery vendor has not been able to access the phone data. *See id.*, at  
6 p. 1. Plaintiffs continue to demand production of responsive documents.  
7 *See* Wolff Decl., ¶ 15.

8 Again, Plaintiffs have been diligently seeking the release of the  
9 Papayans' cell telephone, but have been blocked. Plaintiffs were forced  
10 to oppose Papayans' summary-judgment motion in the interim, and  
11 respond to Papayans' arguments that Plaintiffs lack evidence to support  
12 their claims against him. Defendant Papayans must not be permitted to  
13 benefit from an improper withholding of evidence.

14           **3. *Charlie and Frank Ferrara obstructed the discovery of their***  
15           ***cell phone records and only completed production pursuant to***  
16           ***a court order on July 26, which was well after the Court-***  
                  ***mandated date and after they both filed motions for summary***  
                  ***judgment.***

17 Finally, Plaintiffs only recently received the cell phone text records  
18 from Charlie Ferrara and Frank Ferrara. The production can only be  
19 described as massively redacted, and Plaintiffs have not had adequate  
20 time to review the records or meet and confer regarding the redactions  
21 prior to responding to summary judgment. Though most of the  
22 Defendants' text messages were either redacted or deleted, Defendants  
23 did produce unredacted cell phone bills (albeit for a limited time frame  
24 due to their improper spoliation of relevant bills). Wolff Decl. ¶ 22. Nor  
25 have Plaintiffs had sufficient time to cross-reference Defendants'  
26 unredacted cell phone bills with those of the other Defendants – a time-  
27 consuming process. *Id.* ¶ 23.

28 Charlie and Frank Ferrara served responses to the document

1 requests on December 19, 2016. *See* Wolff Decl., Exhs. 9, 10. In their  
2 responses, they indicated that they had no responsive text messages. *See*  
3 Wolff Decl., Exh. 9 at p. 6-7; Exh. 10 at p. 6 (both responding to RFP No.  
4 7). It was only through the privilege log of co-defendant Sang Lee that  
5 Plaintiffs realized that Charlie and Frank's earlier responses were  
6 untruthful. Sang Lee's privilege log indicates that Frank and Charlie  
7 did indeed send or receive text messages that were responsive to the  
8 RFPs. *See* Wolff Decl., Exh. 11, at 0000105, 106, 108, and 109  
9 (referencing incoming and outgoing text messages between Sang Lee,  
10 Charlie Ferrara, and "Frankie" Ferrera, among others.) And, through  
11 telephonic hearings with counsel for Charlie and Frank Ferrara with  
12 Magistrate Judge Oliver, Plaintiffs learned that Defendants Charlie and  
13 Frank Ferrara responded to the document requests without ever  
14 conducting a search of their cell phones to confirm the existence of  
15 responsive information. Wolff Decl., ¶ 20.

16 Accordingly, the parties began engaging in meet and confer efforts.  
17 Beginning in January 2017, counsel for Plaintiffs met and conferred  
18 several times with counsel for defendants to discuss this issue. *See* Wolff  
19 Decl. ¶ 21. Plaintiffs' counsel conversed with counsel for Charlie and  
20 Frank Ferrara on no less than one half-dozen occasions over seven  
21 months to determine whether Charlie and Frank Ferrara would produce  
22 their cell phone bills and text messages without a court order compelling  
23 them to do so. Wolff Decl. ¶ 21 & Exh. 12. When it became clear that a  
24 court order would be necessary given Defendants Charlie and Frank  
25 Ferrara's intransigence, on June 27, counsel for Plaintiffs set in motion  
26 the process for compelling the production of these documents by sending  
27 a letter to counsel for Defendants demanding a telephonic meet and  
28 confer. *See* Wolff Decl., Exh. 13.

1 A telephonic hearing was held on July 13, 2017, at which time  
2 Magistrate Judge Oliver issued an Order requiring both Charlie and  
3 Frank Ferrara to “produce responsive documents from the cell phone  
4 imaging and responsive cell phone bills and records by 5 p.m. on  
5 Monday, July 17, 2017.” *See* Wolff Decl. ¶ 22 & Exh. 14, at p. 1. In  
6 violation of the Court’s Order, Defendants made only a partial  
7 production on July 17 (after 5:00 p.m.), and then another partial  
8 production after the close of business on July 21. *Id.*, at ¶ 22.  
9 Defendants had *still* not produced any of Charlie Ferrara’s text  
10 messages. *Id.* Moreover, several of the earlier – and most critical – cell  
11 phone invoices had been lost because neither defendant took steps to  
12 preserve this evidence. *Id.* The cell phone bills conveniently only date  
13 back to February 21, 2016, while the events that gave rise to this lawsuit  
14 occurred on January 29, February 5, and February 13, 2016. Indeed,  
15 Charlie Ferrara admitted at his deposition that he has not done anything  
16 to preserve information that is on his cell phone since this lawsuit was  
17 filed and he “ha[s]n’t really tried that hard” to locate prior cell phone  
18 bills. Wolff Decl., Exh. 16 [Charlie Ferrara Dep.] at 164:13-7, 172:25-  
19 173:4. And as the months passed, Defendants’ telephone company  
20 sequentially deleted the older invoices. Wolff Decl. ¶ 25.

21 So on July 26, the parties had another telephonic hearing before  
22 Magistrate Judge Oliver. At the hearing, the Magistrate was flummoxed  
23 by Charlie Ferrara’s failure to produce the cell phone records by the  
24 Court-ordered date:

25 But my recollection is that there was an order to produce this  
26 information on Monday, July 17th... So -- you know, I just -- I don't --  
27 help me understand this. When I litigated, if I had an order after a  
28 conference directing me to produce something, and I could not comply  
with that order, I would race to file something with the court saying I  
am not able to comply with your order, your court order... You just  
chose not to produce all of it.



1 See Wolff Decl., Exh. 15, at 16:3-5, 18-23, and 17:7. Magistrate Judge  
2 Oliver was equally flummoxed by Charlie Ferrara's admission that he  
3 had failed to retain his cell phone invoices:

4 I'm still on the second point about the cell phone bills. It sounds like  
5 after they were served [with the Complaint], after they answered,  
6 discovery was propounded asking for these cell phone records, which  
7 can evaporate, right? The only -- there's a retention policy that the  
8 phone companies have. And I still haven't heard a great answer. And I  
9 just don't think it's satisfactory to say, I'm sorry, that predates my  
10 involvement in the case... So, I guess when I said frustrating, I think  
11 there are a lot of other words that can be used... But it is baffling.

12 *Id.*, at p. 14:5-12, 19-20, 25. Finally, Magistrate Judge Oliver recognized  
13 the prejudicial effect to Plaintiffs in responding to summary judgment by  
14 Defendants' failure to timely produce the cell phone records :

15 I thought it was pretty clear that -- from Ms. Wolff and Mr. Otten that  
16 part of why they were becoming increasingly concerned was the filing  
17 or the anticipated filings of the summary judgment motions. And I just  
18 don't understand how not filing some -- or, excuse me, not producing  
19 some information and then -- you know, I didn't write down everything,  
20 but it sounds like Ms. Wolff is characterizing the summary judgment  
21 motion that you filed is saying there's no evidence...

22 *Id.*, at p. 18:1-9.

23 Defendant Charlie Ferrara finally produced the remainder of his  
24 cell phone extraction report after that hearing on July 26 – notably two  
25 days after filing his motion for summary judgment. *Id.*, at ¶ 23. In total,  
26 Frank Ferrara produced 3,054 pages of documents on July 17 and 21,  
27 and Charlie produced 1,142 pages of documents on July 26 and 27. *Id.*,  
28 at ¶ 24.

29 The productions of Charlie and Frank Ferrara, however, are  
30 heavily redacted. For example, the totality of the first 50 pages of  
31 Charlie Ferrara's productions are nine (9) texts, and these are simply  
32 texts of bible verses. Wolff Decl. ¶ 23. And because Plaintiffs have been  
33 preparing oppositions to eight summary judgment motions over that  
34 timeframe, Plaintiffs have not had sufficient time to analyze the scope or



1 completeness of the production or meet and confer on the extent of the  
2 improper redactions. *See id.*, at ¶ 23.

3 **D. Defendants' Motions for Summary Judgment are predicated in**  
4 **large part on a purported lack of evidence.**

5 All of the Defendants have moved for summary judgment, in large  
6 part on a purported lack of evidence. The City cites to case law and  
7 argues that "the moving party does not need to produce any evidence or  
8 prove the absence of a genuine issue of material fact when the  
9 nonmoving party bears the burden of proving the claim or defense." *See*  
10 ECF No. 268, at 8:3-5. It further argues that there is "no evidence of a  
11 custom or practice to deny beach access or permit harassment." *Id.*, at  
12 14:22-24. Finally, it argues that "there is no evidence that any City  
13 official with final policy-making authority ratified any subordinate's  
14 unconstitutional decision or action." *Id.*, at 18:18-19. Michael Papayans,  
15 whose cell phone was only recently acquired from LAPD but has not yet  
16 been imaged, similarly argues a lack of evidence in support of summary  
17 judgment. *See* ECF No. 278, at 4:11-2 ("they have no evidence sufficient  
18 to show that he is involved in a civil conspiracy, association, or gang.").  
19 Charlie Ferrara also argues a lack of evidence: "The evidence reveals a  
20 complete dearth of any facts demonstrating that Charlie Ferrara  
21 engaged in even one single act or omission capable of supporting any of  
22 Plaintiffs' claims." *See* ECF No. 285-5, at 2:20-21, emphasis in original.  
23 *See also* ECF No. 286-1, at 20-22 (same re Frank Ferrara).

24 The evidence that Plaintiffs seek and are entitled to, including the  
25 text messages between and among the conspirators, bears directly on the  
26 purported absence of evidence.

27 ///

28 ///

1 **III. ARGUMENT**

2 **A. Ninth Circuit precedent requires the grant of motions under Rule**  
3 **56(d) where discovery is yet to be produced.**

4 Rule 56(d) of the Federal Rules of Civil Procedure provides that, in  
5 response to a motion for summary judgment, “If a nonmovant shows by  
6 affidavit or declaration that, for specified reasons, it cannot present facts  
7 essential to justify its opposition, the court may:

8 (1) defer considering the motion or deny it;

9 (2) allow time to obtain affidavits or declarations or to take  
10 discovery; or

11 (3) issue any other appropriate order.”

12 Fed.R.Civ.P. 56(d).

13 The “denial of a Rule 56(f) application is generally disfavored where  
14 the party opposing summary judgment makes (a) a timely application  
15 which (b) specifically identifies (c) relevant information, (d) where there  
16 is some basis for believing that the information sought actually exists.”

17 *Burlington Northern Santa Fe R. Co. v. Assiniboine and Sioux Tribes of*  
18 *Fort Peck Reservation*, 323 F.3d 767, 774–75 (9th Cir. 2003).<sup>2</sup>

19 Rule 56(d) requires, rather than merely permits, discovery where  
20 the nonmoving party has not had the opportunity to discover information  
21

---

22 <sup>2</sup> Federal Rule of Civil Procedure 56(d) was formerly Rule 56(f). The rule was  
23 amended on December 1, 2010, and carries forward without substantial change the  
24 provisions of former subdivision (f). Committee Notes on Rules – 2010  
25 Amendment, Fed. R. Civ. P. 56. Courts in the Ninth Circuit apply existing precedent  
26 under Rule 56(f) to current motions under the revised Rule 56(d). *See Brocade*  
27 *Communications Systems, Inc. v. A10 Networks, Inc.*, 2012 U.S. Dist. LEXIS 2022,  
28 Case No. 10-CV-03428-LHK (N.D. Cal. Jan. 6, 2012); *Roberts v. McAfee, Inc.*, 660  
F.3d 1156, 1169 (9th Cir. 2011) (noting that 56(f) was relocated to 56(d)).

1 that is essential to its opposition. *See Metabolife Intern., Inc. v. Wornick*,  
2 264 F.3d 832, 846 (9th Cir.2001) (citing *Anderson v. Liberty Lobby, Inc.*,  
3 477 U.S. 242, 250 n. 5, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

4 “Summary denial of relief is especially inappropriate where... the  
5 material sought is also the subject of outstanding discovery requests.”  
6 *Burlington Northern Santa Fe R. Co. v. Assiniboine and Sioux Tribes of*  
7 *Fort Peck Reservation*, 323 F.3d at 775. In other words, “[s]ummary  
8 judgment should not be granted while [an] opposing party timely seeks  
9 discovery of potentially favorable information.” *Garret v. City & Cnty. of*  
10 *San Francisco*, 818 F.2d 1515, 1519 (9th Cir. 1987) (citation omitted).

11 This rule requiring the denial of Rule 56(d) motions while discovery  
12 is pending is particularly relevant in situations where the movant has  
13 withheld discovery; a defendant should not be allowed to withhold  
14 discovery, then profit from its malfeasance by being granted summary  
15 judgment for plaintiff’s lack of evidence. As the Northern District  
16 recently held:

17           There is an unconvincing, have-one's-cake-and-eat-  
18           it-too quality to this argument: on the one hand,  
19           the United States has refused to produce the  
20           information Claimants say they need to defend the  
21           case, and on the other it criticizes Claimants for  
22           not having enough information. That Magistrate  
23           Judge James originally determined that Claimants  
                were entitled to the disputed information—a  
                determination that stands, at least as of now—is a  
                sufficient basis for the Court to conclude that the  
                United States' motion should be denied until  
                Claimants have had a fair opportunity to develop  
                the record.

24 *United States v. Real Property and Improvements Located at 2366 San*  
25 *Pablo Avenue, Berkeley, California*, 2014 WL 3704041, at \*3 (N.D. Cal.  
26 2014). *See also Hart v. Gaione*, 2005 WL 419696, at \*1 (C.D. Cal. 2005)  
27 (“It would be inappropriate at this time to rule on Defendant's motion for  
28 summary judgment on his qualified immunity defense because Plaintiff

1 is still awaiting a ruling from Magistrate Judge Nagle on his March 10,  
2 2003 request to compel documents which may be relevant to the issue of  
3 qualified immunity.) *and Lathrop v. Uber Technologies, Inc.*, 2016 WL  
4 3648596, at \*3 (N.D.Cal., 2016) (“Fifth, Plaintiffs have diligently pursued  
5 discovery. Parties have vigorously disputed the scope of discovery  
6 requested by Plaintiffs, which has been the source of no less than five  
7 discovery letter briefs to date.”).

8 **B. Rule 56(d) relief is necessary because the City has failed to produce**  
9 **cell phone records and text messages of its city officials and police**  
10 **officers.**

11 Plaintiffs require the cell phone records of the police officers’  
12 personal phones to the extent that they were used in their duties as  
13 police officers. This information will show communications between and  
14 among the police officers, city officials, and the Bay Boys, and it will  
15 show how PVE and its police force tacitly, or even actively, support the  
16 Bay Boys in their efforts to keep the “riffraff” out of Lunada Bay.  
17 Plaintiffs have been diligently seeking this information since November  
18 of last year, and Defendants have refused to produce responsive  
19 documents, without any basis. *See City of San Jose*, 2 Cal. 5th 608. City  
20 Defendants have now moved for summary judgment largely on the basis  
21 of a purported lack of evidence, and Plaintiffs currently have pending a  
22 motion to compel these documents. Case law uniformly holds that it is  
23 inappropriate to rule on the summary judgment motions for defendants  
24 while a plaintiffs have pending a motion to compel production that seeks  
25 the very evidence that Defendants claim is missing. *See, e.g., Garrett v.*  
26 *City and County of San Francisco*, 818 F.2d 1515, 1519 (C.A.9  
27 (Cal.),1987) (“It was error for the trial court to have granted defendants’  
28 motion for summary judgment without first having determined the  
merits of plaintiff’s pending discovery motion.”)

1           **C. Rule 56(d) relief is necessary because, despite diligent efforts,**  
2           **Michael Papayans' cell phone data has yet to be produced.**

3           Plaintiffs also require the cell phone records of Michael Papayans.  
4           In his response to the request for production of documents, Papayans  
5           made no indication that he was not in possession of his cell phone that  
6           included data during the relevant timeframe. Only in a subsequent meet  
7           and confer did counsel for Papayans indicate that his cell phone had been  
8           impounded as part of a criminal investigation. Plaintiffs have worked  
9           cooperatively with counsel for Papayans to acquire an image of the cell  
10          phone, and they were required to file a stipulation and receive a court  
11          order regarding same. The cell phone was only recently received by the  
12          eDiscovery vendor, and the parties are still working through issues  
13          related to accessing the password-protected phone, search terms and the  
14          producing of documents. Plaintiffs require Papayans' cell phone records  
15          to further demonstrate his involvement with the Bay Boys, their  
16          attempts to restrict access to Lunada Bay, and the scope of the  
17          conspiracy between and among the Bay Boys and the City.

18           **D. Rule 56(d) relief is necessary because Defendants wrongfully**  
19           **withheld documents until after filing for summary judgment.**

20          Finally, Plaintiffs only recently received the text messages of  
21          Charlie and Frank Ferrara, and only after ferreting out the Ferraras'  
22          deceptive responses to the requests for production and moving to compel  
23          production. Even after the Order was issued, Charlie and Frank Ferrara  
24          failed to produce documents within the time frame required by the  
25          Court, leading to many incredulous statements by the Magistrate Judge.  
26          They finally finished their production, and now Plaintiffs must deal with  
27          production documents that have been redacted to a ridiculous degree.

28          Under these facts, Plaintiffs are not able to "present facts essential

1 to justify [their] opposition to summary judgment.” Fed. R. Civ. P. 56(d).  
2 While Plaintiffs were preparing and filing responses to eight summary  
3 judgment motions, and after the time required by the Court, Defendants  
4 Frank and Charlie Ferrara finally produced thousands of pages of  
5 documents, and those pages were improperly redacted. Plaintiffs simply  
6 did not have time to address the deficiencies in the document production  
7 while at the same time preparing oppositions to the numerous motions  
8 prior to the time the oppositions were due. Defendants should not be  
9 rewarded for the discovery malfeasance by being granted summary  
10 judgment without first having complied with their discovery obligations.

11 **IV. CONCLUSION**

12       Aggregately, Defendants have filed eight motions for summary  
13 judgment largely based on an argument that Plaintiffs lack evidence. At  
14 the same time, discovery is not complete, and Plaintiffs are either  
15 awaiting discovery or contesting discovery disputes that are directly  
16 related to the very basis for summary judgment sought by Defendants.  
17 Case law is uniform that under these facts, summary judgment should  
18 **not** be granted. Plaintiffs request that this Court simply deny  
19 Defendants’ motions for summary judgment and allow this case to trial  
20 due to Defendants’ malfeasance. Otherwise, this Court should allow  
21 Plaintiffs enough time to resolve all of the discovery disputes, gather the  
22 required information, and file supplemental oppositions to the motions  
23 for summary judgment.

24 ///

25 ///

26 ///

27 ///

28 ///

1 DATED: August 8, 2017

HANSON BRIDGETT LLP

2  
3  
4 By: /s/ Samantha Wolff

KURT A. FRANKLIN

LISA M. POOLEY

SAMANTHA D. WOLFF

TYSON M. SHOWER

LANDON D. BAILEY

Attorneys for Plaintiffs

CORY SPENCER, DIANA MILENA

REED, and COASTAL PROTECTION

RANGERS, INC.